

OPEN MEETING ITEM
ORIGINAL



COMMISSIONERS
GARY PIERCE - Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

ARIZONA CORPORATION COMMISSION



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ERNEST G. JOHNSON
Executive Director

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2011 MAY -9 P 2:20

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DATE: MAY 9, 2011

DOCKET NO.: W-02526A-10-0499

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Marc E. Stern. The recommendation has been filed in the form of an Opinion and Order on:

BELLEMONT WATER COMPANY
(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

MAY 18, 2011

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

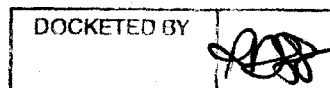
MAY 24, 2011 and MAY 25, 2011

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission

DOCKETED

MAY 9 2011



ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 GARY PIERCE – Chairman
4 BOB STUMP
5 SANDRA D. KENNEDY
6 PAUL NEWMAN
7 BRENDA BURNS

8 IN THE MATTER OF THE INVESTIGATION OF
9 THE FAILURE OF BELLEMONT WATER
10 COMPANY, AN ARIZONA PUBLIC SERVICE
11 CORPORATION, AND BELLEMONT WATER
12 COMPANY SHAREHOLDERS BRAD NESS,
13 GLORIA NESS, ERIK NESS, DIANAH NESS
14 (AKA DIANA NESS), OPERATING AS AN
15 ARIZONA PUBLIC SERVICE CORPORATION IN
16 FACT, TO COMPLY WITH ARIZONA STATUTES
17 AND COMMISSION RULES AND REGULATIONS.

DOCKET NO. W-02526A-10-0499

DECISION NO. _____

OPINION AND ORDER

12 DATE OF HEARING: May 3, 2011
13 PLACE OF HEARING: Phoenix, Arizona
14 ADMINISTRATIVE LAW JUDGE: Marc E. Stern
15 APPEARANCES: Bellemont Water Company, Brad Ness, Gloria Ness,
16 Erik Ness and Dianah Ness, *pro per*; and
17 Ms. Ayesha Vohra and Ms. Bridget Humphrey, Staff
18 Attorneys, Legal Division, on behalf of the Utilities
19 Division of the Arizona Corporation Commission.

19 **BY THE COMMISSION:**

20 On December 16, 2010, the Utilities Division (“Staff”) of the Arizona Corporation
21 Commission (“Commission”) filed a Complaint against Bellemont Water Company (“Bellemont”)
22 and certain of its shareholders as follows: Brad Ness, Gloria Ness; Erik Ness; and Dianah Ness (aka
23 Diana Ness) (collectively “Respondents”) for alleged violations of Arizona law and Commission
24 Decisions.

25 On January 6, 2011, a Joint Answer was filed by Bellemont, Brad Ness, Gloria Ness, Erik
26 Ness and Dianah Ness.

27 On January 12, 2011, a separate response was filed by Klaudia Ness who was not named as a
28 Respondent in the Complaint.

1 On January 14, 2011, by Procedural Order, a procedural conference was scheduled on
2 February 8, 2011.

3 On February 8, 2011, Staff appeared with counsel and Respondents appeared on their own
4 behalf at the procedural conference. The parties discussed the issues in the proceeding, but they were
5 unable to reach a satisfactory resolution of the Complaint. At the conclusion of discussions, Staff
6 requested that a hearing be scheduled.

7 On February 14, 2011, a response was filed by Erik Ness as president of Bellemont.

8 On February 16, 2011, by Procedural Order, a hearing was scheduled on May 3, 2011, and
9 other procedural filing dates were established for the Staff Report (April 8, 2011) and a response by
10 Respondents (April 22, 2011).

11 On April 5, 2011, Brad, Gloria, Erik and Dianah Ness filed a response to Counts 1 through 4
12 of the Complaint.

13 On April 8, 2011, Staff filed a Motion for Extension of Time ("Motion") in which to file its
14 report, which was due to be filed on the date. Staff requested an extension of time until April 15,
15 2011, in which to file its report due to the discovery of new facts and the complicated nature of the
16 proceeding. Staff further stated Respondents' response to the Staff Report should be extended to
17 April 29, 2011.

18 On April 12, 2011, by Procedural Order, Staff's Motion was granted and extensions were
19 authorized for Staff to file its report and for Respondents to file their response.

20 On April 18, 2011, Staff filed a Motion to Amend Complaint to add an additional Count to
21 the Complaint herein based on recently discovered evidence. Additionally, Staff filed a Motion for
22 "Preliminary Injunction".

23 On April 28, 2011, Brad, Gloria, Erik and Dianah Ness filed a request for an extension of time
24 to respond to the amended Complaint together with a request for a continuance of the proceeding.

25 On April 29, 2011, by Procedural Order, Staff's Motion to Amend Complaint was granted.
26 Staff's Motion for Preliminary Injunction was taken under advisement. Respondents' request for an
27 extension of time to respond to the amended Complaint was granted. However, with respect to the
28 request for a continuance of the proceeding, it was taken under advisement pending a discussion at

1 the scheduled outset of the evidentiary hearing on May 3, 2011.

2 On May 3, 2011, a hearing was convened before a duly authorized Administrative Law Judge
3 of the Commission at its offices in Phoenix, Arizona. Staff appeared with counsel and Respondents
4 appeared for Bellemont and on their own behalf. At the beginning of the proceeding, the parties
5 discussed Staff's requested relief in the form of injunctive relief and Respondents indicated they did
6 not oppose this action. Subsequently, a brief hearing was conducted and Bellemont's president
7 testified that Staff's initial requested form of relief was not opposed by the Respondents after which
8 the proceeding was taken under advisement pending submission of a recommended Opinion and
9 Order to the Commission.

10 * * * * *

11 Having considered the entire record herein and being fully advised in the premises, the
12 Commission finds, concludes, and orders that:

13 FINDINGS OF FACT

14 1. Pursuant to authority granted by the Commission in Decision No. 58077 (November
15 12, 1992), Bellemont is an Arizona corporation engaged in the business of providing water service to
16 eight metered commercial customers and to a number of standpipe customers approximately ten
17 miles west of Flagstaff in Coconino County, Arizona.

18 2. The issuance of Bellemont's Certificate was conditioned upon compliance with
19 Arizona law and Commission rules.

20 3. Bellemont's shareholders are Brad Ness, Gloria Ness, Erik Ness, Dianah Ness (aka
21 Diana Ness), Elliot Ness, Klaudia Ness, and George Wong.¹

22 4. Although the Commission's Corporations Division records indicate that Bellemont's
23 officers are Brad Ness (President), Erik Ness (Vice President), Elliot Ness (Treasurer), and Klaudia
24 Ness (Secretary), it was disclosed at the hearing that Erik Ness was recently selected as president of
25 the Company and that Brad Ness is no longer an officer. Bellemont's directors are Brad Ness, Erik
26 Ness, Elliot Ness, and Klaudia Ness.

27
28 ¹ The Ness family controls approximately 75 percent of Bellemont's stock. It is believed that George Wong is deceased and his estate is believed to hold the remainder of the outstanding stock.

1 5. Erik Ness testified, that he is now President, Elliot Ness is now Vice President, Gloria
2 Ness is now Treasurer, and Klaudia Ness remains the Secretary.

3 6. During the August 24, 2010, Commission Open Meeting which resulted in Decision
4 No. 71868 (September 1, 2010), the Commission directed Staff to investigate allegations made by
5 Klaudia Ness that Bellemont's funds were being misused.²

6 7. On December 16, 2010, Staff filed a Complaint alleging that Bellemont, Brad Ness,
7 Gloria Ness, Erik Ness, and Dianah Ness (aka Diana Ness) violated A.R.S. §§ 40-301(B), 40-302(A),
8 40-202(L), 40-204, Commission Decision Nos. 70482 and 71868, as well as A.A.C. R14-2-411.D.4.

9 8. On April 18, 2011, Staff filed an Amended Complaint which included additional
10 allegations that Erik Ness had violated A.R.S. § 40-202(L) and Commission Decision No. 71868.

11 9. Based on the allegations in the amended Complaint, Brad Ness, Gloria Ness, Erik
12 Ness, and Dianah Ness (aka Diana Ness) are serving as a public service corporation in fact by virtue
13 of their disregard for the corporate form, their use of company revenue for personal expenses, and
14 their co-mingling of corporate and personal funds

15 10. The Amended Complaint requested relief in the form of an injunction "to enjoin the
16 Company from allowing Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (aka Diana Ness) access
17 to Company funds and bank accounts."³ The Complaint additionally requested relief "to enjoin Brad
18 Ness, Gloria Ness, Erik Ness, or Dianah Ness (aka Diana Ness) from accessing Company funds and
19 bank accounts."⁴

20 11. On April 15, 2011, Staff filed a Staff Report which provides the factual basis for the
21 alleged violations.

22 12. On April 18, 2011, Staff filed a Motion for Preliminary Injunction again requesting
23 that the Commission approve injunctive relief against the Respondents.

24 13. Although the Respondents deny the misuse of Bellemont's funds, Brad Ness, Gloria
25 Ness, Erik Ness, and Dianah Ness (aka Diana Ness) do not oppose the issuance of injunctive relief as
26

27 ² Decision No. 71868 was the result of the Company's last rate case. In that proceeding, the Commission also denied
Bellemont's application for financing approval for \$1.75 million to develop another water source for the utility.

28 ³ Docket No. W-02526A-10-499, Complaint at 9:9-10.

⁴ Docket No. W-02526A-10-0499, Complaint at 9:13-14.

1 requested by Staff.

2 14. There is a significant possibility of irreparable injury and further violation of
3 Commission Decisions if Brad Ness, Gloria Ness, Erik Ness, or Dianah Ness (aka Diana Ness) are
4 not prohibited from accessing Bellemont's funds and bank accounts.

5 15. The balance of hardships favors the granting of the relief requested by Staff in this
6 matter.

7 16. Public policy favors the granting of the requested relief in this matter.

8 **CONCLUSIONS OF LAW**

9 1. Bellemont is a public service corporation within the meaning of Article XV of the
10 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

11 2. Pursuant of Article XV of the Arizona Constitution and A.R.S. § 40-246, the
12 Commission has jurisdiction to hear complaints against public service corporations.

13 3. The Commission has jurisdiction over Bellemont, Brad Ness, Gloria Ness, Erik Ness,
14 and Dianah Ness (aka Diana Ness) and the subject matter of this Complaint.

15 4. Staff's requested relief which has been agreed to by Brad Ness, Gloria Ness, Erik
16 Ness, and Dianah Ness (aka Diana Ness) is warranted in this instance and should be issued.

17 **ORDER**

18 IT IS THEREFORE ORDERED that Bellemont Water Company shall not allow Brad Ness,
19 Gloria Ness, Erik Ness, and Dianah Ness (aka Diana Ness) access to any funds and bank accounts of
20 Bellemont Water Company until further order of the Commission.

21 IT IS FURTHER ORDERED that Brad Ness, Gloria Ness, Erik Ness, and Dianah Ness (aka
22 Diana Ness) shall not access any of the revenues and bank accounts of Bellemont Water Company
23 until further order by the Commission.

24 ...

25 ...

26 ...

27 ...

28 ...

1 IT IS FURTHER ORDERED that the Hearing Division shall issue a Procedural Order to
2 schedule further proceedings in the matter in order to address the material issues raised by the
3 Complaint as amended.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
6
7

8 CHAIRMAN

COMMISSIONER

10 COMMISSIONER

COMMISSIONER

COMMISSIONER

12 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,
13 Executive Director of the Arizona Corporation Commission,
14 have hereunto set my hand and caused the official seal of the
15 Commission to be affixed at the Capitol, in the City of Phoenix,
16 this _____ day of _____, 2011.

17 _____
18 ERNEST G. JOHNSON
19 EXECUTIVE DIRECTOR

20 DISSENT _____

22 DISSENT _____

MES:db

1 SERVICE LIST FOR:

BELLEMONT WATER COMPANY

2 DOCKET NO.

W-02526A-10-0499

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4 Brad Ness

Gloria Ness

Erik Ness

5 Dianah Ness

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6 Kingman, AZ 86409

7 BELLEMONT WATER COMPANY

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9 Mary Keller Wong

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